

1 **BOARD OF PERSONNEL APPEALS**
2 **PO BOX 6518**
3 **HELENA MT 59604-6518**
4 **Telephone: (406) 444-2718**
5 **Fax: (406) 444-7071**
6

7 **STATE OF MONTANA**
8 **BEFORE THE BOARD OF PERSONNEL APPEALS**
9

10 **IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 13-2008:**
11

12 **INTERNATIONAL BROTHERHOOD OF**
13 **TEAMSTERS LOCAL NO. 2**

14)
15 Complainant,)
16)

17 vs.)

18) **RECOMMENDED ORDER**
19 **STATE OF MONTANA,**) **OF DISMISSAL**
20 **DEPARTMENT OF TRANSPORTATION**)
21)

22 Defendant,)
23)
24)

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27 **I. INTRODUCTION**
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30 On February 21, 2008, Teamsters Local No. 2, filed an unfair labor practice charge with
31 the Board of Personnel Appeals alleging that the State of Montana, Department of
32 Transportation, hereafter MDT, violated 39-31-201, 39-31-401(1) and 39-31-401(5) MCA
33 by refusing to execute and implement a negotiated settlement agreement arising out of a
34 grievance mediation. The Teamsters are represented in this matter by D. Patrick
35 McKittrick, Esq. On March 3, 2008, MDT filed a response with the Board denying any
36 violation of Montana law. MDT further requested that the unfair labor practice charge be
37 dismissed. MDT further expressed its willingness to continue with the applicable
38 grievance procedure, including final and binding arbitration. MDT is represented in this
39 matter by Gregory Martin, Labor Relations Specialist with the State Office of Labor
40 Relations.
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43 Pursuant to Section 39-31-405 (1) John Andrew was appointed by the Board of Personnel
44 Appeals to investigate the charge. During the course of the investigation information was
45 exchanged between the investigator and the parties.
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48 In oral communication with the investigator MDT clarified its response to the charge and
49 requested that the matter be deferred to the grievance procedure. This clarification was
50 conveyed to the complainant and on April 8, 2008, the Teamsters supplemented their
initial charge with additional authority, a copy of which was provided to MDT.

II. FINDINGS AND DISCUSSION

Teamsters Local No. 2 did not allege in its complaint that there was a violation of 39-31-401 (2), (3), or (4) MCA, nor did the Teamsters allege any such violation during the course of the investigation. In fact, the investigator found no indication of anti-union animus on the part of MDT or its representatives.

This complaint concerns a grievance filed by the Teamsters against MDT under the terms of an existing collective bargaining agreement. The grievance was processed through the initial steps of the grievance procedure. The parties had selected an arbitrator to hear the grievance on December 4, 2007.

Prior to the scheduled hearing date Paula Stoll, Chief of the State Office of Labor Relations, approached Mr. McKittrick about doing grievance mediation prior to the arbitration. Mr. McKittrick agreed to participate in mediation while still maintaining the scheduled arbitration date. Mediation was held before Federal Mediation and Conciliation Service Commissioner Ted Handel on November 26, 2007. Mediation began in the morning. Present on behalf of the MDT were Paula Stoll and Jennifer Jensen, the MDT Human Resources Administrator. Present for the Teamsters were Pat McKittrick, Mark Brandt, Debbie Thomas, Bill Rowe and the grievant, Rhonda Cherry. Because of a family emergency Paula Stoll was not present for the afternoon session, but the other participants were present.

The grievances at the heart of this dispute concern warning, suspension and discharge from employment issues involving Ms. Cherry and MDT. The contention of the Teamsters is that throughout the November 26, 2007, mediation it was made abundantly clear to MDT that neither Mr. McKittrick nor the Teamsters represented Ms. Cherry in human rights and unemployment matters currently pending in district court between Ms. Cherry and MDT. It was further made clear to MDT that neither the Teamsters nor Mr. McKittrick had any authority to compromise or resolve the cases before the district court as Ms. Cherry had retained Robert Whelan, Esq., to represent her in these matters. In fact, all indications to the investigator are that MDT was fully aware that the authority of Mr. McKittrick and the Teamsters was confined to resolving the contractual grievances only. The question remains as to whether there was a meeting of the minds to resolve the grievances and thus an enforceable agreement between the parties that the MDT failed to execute.

Based on the information obtained by the investigator it is apparent that the mediation session did conclude the afternoon of November 26, 2007. At that point there clearly was some solid basis of understanding between the parties. This is manifested by the fact that on that very afternoon Susan Rebeck, counsel for MDT, spoke to Mr. McKittrick by telephone. That same afternoon Ms. Rebeck faxed Mr. McKittrick a draft "MEMORANDUM OF NEGOTIATED SETTLEMENT OF DISCIPLINE". The draft, for whatever reason, contained language pertaining to the Montana Public Employees Association and its past executive director. Nowhere in this initial document was there a reference to a settlement amount. Giving it the benefit of doubt the draft was at best bare

1 bones. However in one area it clearly provided:

2
3 "The parties agree that the unemployment matter and human right
4 complaint are not settled and released and each reserves their claims yada
5 yada yada;"
6
7

8 Thus, looking beyond the Seinfeldesque language contained in this rather languid work
9 product, is a clear understanding that the human rights and unemployment matters never
10 were a part of the settlement discussions. Ms. Rebeck was obviously aware of this and
11 since she was not actually at the table for the mediation one can only infer that in order for
12 her to prepare this draft document someone at MDT had to convey that fact to her.
13
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15 When he received this draft Mr. McKittrick offered suggestions and changes and submitted
16 them to Ms. Rebeck. It is not clear how this was accomplished, but apparently by phone.
17 As a result of whatever communications there were Ms. Rebeck prepared another draft,
18 seemingly sent November 27, 2007. This draft reflected Mr. McKittrick's suggested
19 changes, including the amount of \$50,000 as was apparently agreed to at the November
20 26 mediation session. The human rights and unemployment matters were specifically
21 excluded, also as per the November 26 mediation session. Another draft, with additional
22 changes was faxed by Ms. Rebeck to Mr. McKittrick the afternoon of November 27, 2007,
23 and (according to Ms. Rebeck's letter of December 14, 2007) a last draft was sent via fax
24 to Mr. McKittrick on November 28, 2007.
25
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27 Following the above chronology, on December 4, 2007, Mr. McKittrick faxed a letter to Ms.
28 Rebeck containing language Mr. Whelan wished to have in the settlement agreement
29 between the Teamsters and MDT. The language requested by Mr. Whalen was to be
30 contained in section 11 the opening paragraph of which reads:
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32

33 11. The parties agree that the following matters are not settled and are specifically
34 excluded from this release. Employee and MDT each reserve all rights, claims and
35 defense that each could assert therein.
36
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38 The insert language requested by Mr. Whalen read:
39

40 Employee and Montana Department of Transportation each reserve all causes of
41 action, and rights to pursue or recover costs, expenses, attorneys fees, loss of
42 services, loss of wages, loss of income, loss of earnings, loss of earning capacity,
43 pain, suffering, emotional distress, health care expenses, and damages of every
44 kind and nature arising from any act, event, or occurrence in connection with the
45 following:
46
47

48 The remaining portion of paragraph 11 merely recited the human rights and
49 unemployment cases already before the district court.
50

This suggested language was the proverbial straw that broke the camel's back, or as
suggested by Mr. Martin in his response, "vaporized" the deal. From this point forward

1 communications ensued between Mr. McKittrick and Ms. Rebeck and eventually the
2 instant unfair labor practice charge was filed, with the caveat that on November 29, 2007,
3 the pending arbitration hearing was vacated and mutually held in abeyance by the parties
4 with each side bearing one half of the cost of the cancelled plane ticket of the arbitrator.
5

6
7 The Montana Supreme Court has approved the practice of the Board of Personnel
8 Appeals using Federal Court and National Labor Relations Board (NLRB) precedents as
9 guidelines in interpreting the Montana Collective Bargaining for Public Employees Act as
10 the State act is so similar to the Federal Labor Management Relations Act, State ex rel.
11 Board of Personnel Appeals v. District Court, 183 Mont 223, 598 P.2d 1117, 103 LRRM
12 2297; Teamster's Local Union No. 45 v. State ex rel. Board of Personnel Appeals, 195
13 Mont 272, 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v Young (Young III) 211
14 Mont 13, 686 P.2d 185, 119 LRRM 2682.
15

16
17 In ULP 43-81, William Converse v Anaconda Deer Lodge County and ULP 44-81 James
18 Forsman v Anaconda Deer Lodge County, August 13, 1982, the Board of Personnel
19 Appeals adopted National Labor Relations Board precedent set forth in Collyer Insulated
20 Wire, 192 NLRB 387, 77 LRRM 1931, deferring certain unfair labor practice proceedings
21 to an existing negotiated grievance/arbitration procedure.
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24 Here MDT has already expressed its willingness to proceed to arbitration, and as
25 previously mentioned, there are no allegations either in the complaint or in
26 communications with the investigator that the actions of MDT are motivated by anti-union
27 animus. Is there cause for the Teamsters to believe MDT bargained in bad faith?
28 Arguably so given that all the elements of settlement discussed at the November 26, 2007,
29 mediation session were incorporated in the draft settlement agreement and seemingly
30 approved on the highest levels of MDT. However, as with, for instance a tentative
31 agreement on a labor contract, ratification has to occur and all details for ratification, or
32 approval of a settlement in this case, have to be in place before a conceptual
33 understanding can pass muster on both sides of the table. That did not happen here - not
34 for a lack of effort by the parties or through bad faith by either party, appearances aside.
35 Rather, if a triggering event can be identified it is the language offered by Ms. Cherry's
36 private counsel that scuttled the understanding. Whatever the cause, the proverbial
37 paperwork was not completed and there is no complete understanding, written or oral, for
38 the Board of Personnel Appeals to enforce. Absent a compelling legal authority, and none
39 has been shown by the complaining party, nor can one be found by the investigator, as to
40 why this matter should be heard by the Board the recourse to the grievant and to the union
41 is to follow the grievance process to its ultimate conclusion. At best, relief to the
42 Teamsters might be available were this to be considered for a Dubo, 142 NLRB, 431, 53
43 LRRM 1070 (1963) type decision, but even then guidance of the general counsel of the
44 National Labor Relations Board requires the complaining party to follow either the
45 grievance procedure, or to vindicate statutory rights, but not both. A Dubo type approach
46 was not argued by the Teamsters, nor does it seem appropriate given that the only
47 elements of this complaint are violations of 39-31-401 (1) and (5). The elements simply
48 are not there for the Board to ignore the precedent established in Collyer and
49 Converse/Forsman. Deferral is appropriate in this case.
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2 **III. RECOMMENDED ORDER**
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4 It is hereby recommended that the above matter be dismissed. To eliminate the risk of
5 prejudice to any party the Board of Personnel Appeals retains jurisdiction over this matter
6 for the purpose entertaining an appropriate and timely motion for further consideration
7 upon a proper showing that either the dispute has not, within a reasonable time, been
8 resolved pursuant to the parties' negotiated grievance/arbitration procedure; or the
9 grievance/arbitration proceedings have not been fair and regular or have reached a result
10 which is repugnant to the Montana Collective Bargaining for Public Employees Act.
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15 **SPECIAL NOTICE**

16 Exceptions to this Recommended Order may be filed within twenty (20) days of service
17 thereof. If no exceptions are filed, this Recommended Order shall become the Order of
18 the Board of Personnel Appeals. Address exceptions to the Board of Personnel Appeals,
19 P.O. Box 6518, Helena, Montana 59604-6518.
20
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22
23 Dated this 7th day of May 2008.
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25
26 BOARD OF PERSONNEL APPEALS
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30
31 By: _____/S/_____
32 John Andrew, Investigator
33
34

35 *****
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37 **CERTIFICATE OF SERVICE**
38

39 The undersigned does hereby certify that a true and correct copy of the foregoing
40 Recommended Order of Dismissal was served upon the following on the _____ day
41 of _____, 2008, postage paid and addressed or delivered as indicated:
42
43

44 D PATRICK MCKITTRICK
45 MCKITTRICK LAW FIRM PC
46 PO BOX 1184
47 GREAT FALLS MT 59403
48

49 GREGORY MARTIN
50 LABOR RELATIONS SPECIALIST
PO BOX 200152
HELENA MT 59620 0152
